From: Jim Delong
To: Microsoft ATR
Date: 1/25/02 11:57am
Subject: Microsoft Settlement

Attached are the comments of the Competitive Enterprise Institute.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff

Civil Action No. 98-1232 (CKK)

v.

MICROSOFT CORP.

Defendant

COMMENTS ON THE PROPOSED SETTLEMENT

BY:

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RECOMMENDATION: ACCEPT THE SETTLEMENT

The proposed settlement provides extensive relief for the alleged offenses, more than the court would find proper were proceedings to continue. It should be accepted.

A serious argument can be made that the settlement goes too far and should be rejected as a misguided effort at industrial policy imposed by the lawyers and economists of the "antitrust industry"[1] that is antithetical to the public interest. Supporters of this view can cite the detail of the settlement and its underlying premise that the drafters know how competition should be structured in a highly complex and rapidly-changing industry. By attempting to put relations among the companies into a straight jacket, the settlement may suppress competition rather than enhance it.

However, on balance, the damage the litigation is doing to the industry and to the legal system is serious and the sooner it ends, the better. Also, Microsoft has accepted this settlement as better than continued proceedings, and it seems unfair to force it to maintain the battle to protect the interests of the public rather than itself. The involved government(s) are supposed to exercise that function. The serious intellectual and analytic failings afflicting antitrust law and policy are topics for public debate and for Congress, but should not delay the termination of this proceeding.

THE DECREE IS SUFFICIENT

The context within which the settlement must be evaluated was set forth by Charles James in testimony before the Senate last month:

> The D.C. Circuit, however, significantly narrowed the case, affirming the district court's finding of liability only as to the monopoly maintenance claim, and even there only as to a smaller number of specified anticompetitive actions. Of the twenty anticompetitive acts the court of appeals reviewed, it reversed with respect to eight of the acts that the district court had sustained as elements of the monopoly maintenance claim. Additionally, the D.C. Circuit reversed the lower court's finding that Microsoft's "course of conduct" separately violated Section 2 of the Sherman Act. It reversed the district court's rulings on the attempted monopolization and tying claims, remanding the tying claim for further proceedings under a much more difficult rule of reason standard. And, of course, it vacated the district court's final judgment that had set forth the break-up remedy and interim conduct remedies.
>
> The antitrust laws do not prohibit a firm from having a monopoly, but only from illegally acquiring or maintaining a monopoly through interference with the competitive efforts of rivals. There has never been any serious contention that Microsoft acquired its operating system monopoly through unlawful means,

[1] See Robert Reich, *The Antitrust Industry*, 68 Geo. L. J. 1053 (1980); James V. DeLong, "The New Trustbusters," *Reason* (March 1999) <www.reason.com/9903/fe.jd.the.shtml>

and the existence of the operating system monopoly itself was not challenged in this case.[2]

Mr. James could have added that the Court of Appeals opinion also said: "We have found a causal connection between Microsoft's exclusionary conduct and its continuing position in the operating systems market only through inference," and quoted the late Phillip Areeda to the effect that imposition of any remedy going beyond a simple injunction against the illegal conduct should be based on a clear causal connection, and emphasized that "great caution" is necessary in crafting intrusive relief.[3] The court's cautionary remarks focused on the remedy of divestiture, which was then still on the table, but they apply to any radical remedy – and the remedies in the settlement are unprecedented in their scope and intrusiveness.

Granting full respect to concepts of "fencing in" and other doctrines to the effect that a remedial decree should prevent future illegal activity, the requests by opponents of the decree go far beyond what is proper. They seem based on the premise that the government won on all its counts. Even if this premise were true, even if the government *had* proven all of its charges, the proposed settlement would be a more than adequate remedy.

Nor is the opposition entitled to play "gotcha," assuming that because the Court of Appeals decided that some of Microsoft's actions should be held to be illegal – and it must be remembered that this is an *ex post facto* judgment because the law applicable to dominant firm behavior remains blindingly unclear -- the plaintiffs are entitled to *carte blanche* on the remedy. The dissenting plaintiffs want the equivalent of the death penalty for a speeding ticket.

HARM TO THE LEGAL SYSTEM

Another powerful argument for accepting the settlement is that this case is doing for antitrust law what the O. J. Simpson trial did for the criminal law – it is making it into an object of public derision, and is greatly contributing to public cynicism about the law and the legal system in general.

For example:

- As has been extensively documented, the case was conceived in spin, so to speak, as various players in the computer industry spent millions of dollars

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[2] Charles James, AAG Antitrust Division, Statement before the Committee on the Judiciary, United States Senate, *The Microsoft Settlement: A Look to the Future* (Dec. 12, 2001) <http://www.senate.gov/~judiciary/te121201f-james.htm>

[3] U.S. v. Microsoft Corp., 253 F.3d 34, 80, 106-07 (D.C. Cir. 2001).

retaining former government officials to develop arguments that would create a comfort zone for the head of the Antitrust Division.[4]

- The contacts between the trial judge and the press were the subject of unusually scathing language by the Court of Appeals.

- Since the settlement was announced, numerous press releases by interested parties and by the attorneys general of the non-consenting states have misrepresented the situation by charging that the government "won" and is now surrendering. These traduce Charles James, and even seem designed to put pressure on the court to decide according to political factors rather than legal ones.

Were the case to continue, its destructive impact could only worsen because the nature and validity of the Findings of Fact on which any revised remedy would have to be based are hopelessly confused. Many of them are what administrative law classifies as "legislative facts." As the undersigned wrote before the Court of Appeals decision:

> Among the judge's 412 findings of fact, covering 140 pages of text, are some specific conclusions about who did what when. But they are overshadowed by complex technical assessments about the results of these actions, by conclusions about the economics of the high- tech world, and by predictions about the future. . . . . Even if the rules on dominant-firm behavior were clear, which they are not, and even if the assessment of when a firm is dominant were straightforward, which it is not, the computer and communications revolutions have so changed the context that the proper application of the antitrust rules has become a matter of considerable bafflement.
>
> A reviewing court will have a tough time determining which of the findings in *Microsoft* are real, factual findings to which it must defer, which are conclusions of law disguised as facts, and which are legislative facts.[5]

To uphold Judge Jackson's findings, the Court of Appeals had to determine that Microsoft had failed to challenge them, not that they were correct. The Supreme Court declined to hear the argument that the Findings of Fact should be vacated *ab initio* because of the bias of the trial judge.

Because of these decisions, if the remedies phase of the case were to be re-opened, this court would face an impossible task. It would be required to craft a

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[4] John Heilemann, "The Truth, the Whole Truth, and Nothing but the Truth," *Wired*, Nov. 2000, p. 260 < www.wired.com/wired/archive/8.11/microsoft.html>.

[5] James V. DeLong, "No Fool for Microsoft," *Legal Times*, Nov. 6, 2000 <available on www.westlaw.com>. For a detailed analysis of the Findings, see Alan Reynolds, *The Microsoft Antitrust Appeal: Judge Jackson's 'Findings of Fact' Revisited*, Hudson Institute 2001.

remedy based on findings that do not qualify as real "facts" in a situation where all parties are acting strategically and attempting to retry the original action in the guise of an inquiry into the proper remedy.

And overhanging the enterprise would be the issue – still undecided by the Supreme Court and not waived by Microsoft – whether the original Findings of Fact should have been vacated and the liability issue retried.

To a certainty, if the settlement is reopened, more years of litigation are in prospect, to the further detriment of the legal system and the economy.

CONCLUSION

The settlement presents an opportunity to escape from the Big Muddy that should not be missed.[6]

RESPECTFULLY SUBMITTED,

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[6] *See* Pete Seeger, "Waist Deep in the Big Muddy" (1967) http://www.dickalba.demon.co.uk/songs /texts/bigmuddy.htm.